BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN M. KIRKER, SR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,050,186
BOB BERGKAMP CONSTRUCTION CO., INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the June 28, 2011, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Workers Compensation Board heard oral argument on September 16, 2011, in Wichita, Kansas. E. L. Lee Kinch of Wichita, Kansas, was appointed by the Director to serve as a Board Member Pro Tem in this matter in place of former Board Member Julie Sample.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for claimant. Ali N. Marchant of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board, the parties stipulated that after the accident suffered by claimant that gave rise to this claim, claimant has a 10% permanent functional impairment for loss of use of the right forearm and a 10% permanent functional impairment for loss of use of the left forearm. Respondent, however, maintains it is entitled to a credit for claimant's preexisting impairment as a result of claimant's 2000 workers compensation claim and subsequent agreed award.

ISSUES

In the June 28, 2011, Award, ALJ Clark granted claimant an award for a 10% loss of use of the left forearm and an award for a 10% loss of use of the right forearm.

Respondent contends it is entitled to a credit under K.S.A. 2009 Supp. 44-501(c) for the preexisting impairment claimant had to his wrists as a result of his 2000 workers compensation claim and subsequent agreed award. In his June 28, 2011, Award, ALJ Clark was silent on the issue of a credit. He found claimant had a 10% permanent functional impairment for the loss of use of his left forearm and a 10% permanent functional impairment for the loss of use of his right forearm. Respondent requests the Board modify the June 28, 2011, Award.

Claimant contends the Award should be affirmed. Claimant states in his brief to the Board:

> In this case, the only evidence of functional impairment is that which was provided by Drs. Gywn and Fluter. Neither physician expressed an opinion as to claimant's pre-existing condition. In fact, both physicians expressed opinions of functional impairment as a result of claimant's most recent 2005 injuries. Dr. Fluter testified that his opinions regarding permanent impairment of function are intended to rate a condition which developed as a result of the 2005 injuries. Respondent offered no evidence which would form the basis of a reduction pursuant to K.S.A. 44-501(c).[1]

At the regular hearing, nature and extent of claimant's disability was noted as an issue. At the hearing, respondent's counsel did not specifically request a reduction in the award pursuant to K.S.A. 2009 Supp. 44-501(c). Respondent's counsel at regular hearing did not specifically request a credit for claimant's preexisting impairment. However, at oral argument before the Board, claimant's counsel stipulated that respondent properly raised as an issue whether respondent is entitled to a credit for preexisting impairment.

The issues before the Board on this appeal are:

1. What portion of the stipulated 10% permanent impairment to the left forearm and 10% permanent impairment to the right forearm is attributable to the work-related accident?

2. Did the ALJ err in failing to reduce the award by an amount for preexisting functional impairment as required by K.S.A. 2009 Supp. 44-501(c)?

---

[1] Claimant's Brief at 4 (filed Aug. 15, 2011).

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant began working for respondent in July 2004 as a truck mechanic. Claimant performed a wide variety of mechanical duties on semi trucks, dump trucks and pickups. He would repair engines, transmissions and rear ends, which would involve heavy lifting. Claimant also did routine maintenance and minor work, such as oil changes, tire repair and changes and replacing light bulbs. His job required that he perform a great number of repetitive tasks.

Prior to working for respondent, claimant had a history of bilateral carpal tunnel problems. In 2000, while working at Cessna, claimant filed a workers compensation claim because of bilateral carpal tunnel syndrome. Dr. J. Mark Melhorn performed bilateral carpal tunnel releases in April 2000. Dr. Melhorn assigned a 7.05% permanent functional impairment for each upper extremity.

Claimant was examined by Dr. Pedro A. Murati, who assigned a 10% permanent functional impairment to each upper extremity. Claimant settled the claim on January 16, 2001. In the Agreed Award, the parties stipulated claimant had an 8% permanent functional impairment to each upper extremity as a result of the carpal tunnel condition.[2]

The Agreed Award does not state that the impairment ratings of Drs. Melhorn and Murati are in accordance with the AMA *Guides*.[3] However, the Agreed Award does state the reports of the two physicians are admitted into evidence without further foundation. The medical reports of Drs. Melhorn and Murati attached to the Agreed Award state that the impairment ratings they assigned are in accordance with the AMA *Guides*.

At the regular hearing, claimant testified that after the 2000 surgeries, his symptoms resolved. Claimant again began experiencing problems with his hands in January 2005. He had tingling in his hands and fingers and reported it to his supervisor. Claimant did not seek medical treatment until 2010. His supervisor indicated there was not enough time to allow claimant to seek medical treatment because of the busy nature of respondent's business.

Claimant testified that after he underwent the carpal tunnel release surgeries in 2000, his symptoms were resolved. He also indicated that it was not until 2005 that he

---

[2] R.H. Trans., Cl. Ex. 1.

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

again began experiencing symptoms of carpal tunnel syndrome. Claimant filed an application for hearing on April 2, 2010, alleging a repetitive injury to the bilateral upper extremities.

On April 7, 2010, claimant saw Dr. David T. Gwyn, certified by the American Board of Orthopaedic Surgery as an orthopedic surgeon with a subspecialty in hand surgery. Dr. Gwyn had claimant complete a medical history questionnaire and conducted a physical examination. He diagnosed claimant with bilateral carpal tunnel syndrome and injected both wrists with Celestone. The injections provided claimant little relief. Dr. Gwyn performed a left carpal tunnel release on May 27, 2010, and a right carpal tunnel release on June 17, 2010.

Claimant was released to work by Dr. Gwyn on August 2, 2010, with no restrictions. A medical note of Dr. Gwyn dated August 2, 2010, states: "He [claimant] is doing quite well and states that his numbness and tingling have resolved, as has his pain. His grip strength seems to have improved by his account as well."[4] In a letter dated November 25, 2010, Dr. Gwyn opined that in accordance with the AMA *Guides*, claimant suffered no permanent impairment to either upper extremity.[5] Dr. Gwyn acknowledged that he only tested claimant's grip strength during the first appointment. He never tested claimant's grip strength following surgery. Dr. Gwyn did not consider grip strength when he determined claimant had no permanent impairment. Instead, he determined claimant was not permanently impaired based upon sensation and motion of the hands.

After completing treatment with Dr. Gwyn, claimant returned to his former job and performed his normal work duties. Claimant testified he still has numbness and tingling in his left thumb and the grip strength in his hands is weak.

Claimant's counsel referred claimant to Dr. George G. Fluter, certified by the American Board of Physical Medicine & Rehabilitation. On September 1, 2010, Dr. Fluter examined claimant and obtained a medical history from him. Claimant complained to Dr. Fluter of numbness and tingling in both hands and loss of grip strength. He reported, however, that he had no significant problems after the surgeries by Dr. Melhorn. Dr. Fluter also reviewed the medical records of Dr. Gwyn and Dr. C. Reiff Brown, who saw claimant in April 2010.

Dr. Fluter opined claimant has a mild postoperative degree of median nerve entrapment at the right and left wrists. Using Table 16 (page 3/57) of the AMA *Guides*, he opined claimant has a 10% permanent impairment to each upper extremity. Utilizing Figure 26 (page 3/36) and Figure 29 (page 3/38) of the AMA *Guides*, he opined claimant

---

[4] Gwyn Depo., Ex. 2.

[5] *Id.*, Ex. 3.

also has a 3% permanent impairment to each upper extremity at the level of the wrist for range of motion deficits. Using the Combined Values Chart of the AMA *Guides*, there is a total permanent functional impairment of 13% to each upper extremity. Dr. Fluter also placed restrictions upon claimant.

Dr. Fluter opined that all of the 13% permanent functional impairment he assigned was attributable to claimant's current injury. He did not review the records of Drs. Melhorn and Murati. Dr. Fluter was unaware that Drs. Melhorn and Murati assigned claimant a permanent impairment to the upper extremities. He did acknowledge that claimant could have had a preexisting impairment after the 2000 surgeries.

The ALJ found that claimant has a 10% permanent impairment to each forearm as a result of the injuries that are the subject of this claim. At oral argument before the Board, the parties stipulated claimant suffered a 10% permanent impairment to each forearm after the accident that gave rise to this claim. The ALJ did not reduce the award by an amount for preexisting impairment. In fact, in his Award the ALJ did not mention respondent's request for a reduction in benefits pursuant to K.S.A. 2009 Supp. 44-501(c). Therefore, it is unknown whether the ALJ failed to address this issue, or considered and rejected respondent's request for a credit for prior impairment.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) in part states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2009 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The Kansas Court of Appeals in *Hanson*[6] states that once a claimant provides evidence that he or she aggravated a preexisting condition, the respondent has the burden of proving the claimant's amount of preexisting impairment as a deduction from total impairment. In *Hanson*, the court noted "Hence, the claimant need only show aggravation or acceleration of the condition and a causal relationship between the work-related injury and the disability. Once the claimant shows increased disability, compensation is for the full amount of disability less any amount of preexisting impairment established by the respondent. This is also pragmatic."[7]

In his brief to the Board, claimant's counsel cites *Robles*.[8] Robles suffered a work-related low back injury in 2001. In the early 1990s, Robles injured his back in an automobile accident. One physician testified that Robles had a 10% impairment after the work-related accident, but had a 5% preexisting back impairment. The respondent sought credit pursuant to K.S.A. 44-501. The Board held:

> Consequently, for the date of accident in question the Act requires that before an award may be reduced for a preexisting functional impairment, the worker must have a functional impairment that is ratable under the AMA *Guides* (4th ed.), if the impairment is contained in those *Guides*. Moreover, the Act requires the amount of the functional impairment be established by competent medical evidence.[9]

In *Jacobs*,[10] the central issue was whether the respondent was entitled to a credit for Jacobs' preexisting impairment. Jacobs had a left knee replacement in 1980. Two physicians indicated he had a "good" result, which pursuant to the AMA *Guides*, results in a 37% impairment rating. In 2001, Jacobs suffered a work-related injury to the left knee, which resulted in another left knee replacement. Both physicians opined that after the 2001 left knee replacement, Jacobs had a 50% permanent impairment to the left knee. The respondent alleged only 13% was attributable to the 2001 injury. The Board concluded the respondent was entitled to a 37% credit for the left knee.

---

[6] *Hanson v. Logan U.S.D. 326,* 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[7] *Id.*, at 96.

[8] *Robles v. Carpet Express*, No. 1,002,378, 2004 WL 237678 (Kan. WCAB Jan. 30, 2004).

[9] *Id.*

[10] *Jacobs v. Chamness Technology*, Nos. 1,003,734 & 1,005,459, 2005 WL 1634400 (Kan. WCAB June 30, 2005).

ANALYSIS AND CONCLUSION

If a work-related event causes an aggravation of a preexisting condition, the employee is entitled to compensation for an increase in the functional impairment. In such claims, *Hanson* provides that the respondent has the burden of proving the claimant's amount of preexisting impairment as a deduction from total impairment. The respondent must prove the amount of preexisting functional impairment with competent medical evidence. The Board finds that respondent has failed to meet its burden of proof.

Respondent introduced into evidence the medical reports of Drs. Melhorn and Murati that were made exhibits to the Agreed Award of January 16, 2001. Dr. Melhorn opined claimant had a 7.05% impairment to each upper extremity while Dr. Murati opined claimant had a 10% impairment to each upper extremity. At oral argument before the Board, respondent's counsel requested that 7.05% to 10% for each upper extremity be subtracted from claimant's award in the current claim.

Only two physicians testified in this matter. Dr. Gwyn opined claimant has no functional impairment. Dr. Fluter opined claimant has a 13% permanent functional impairment to each upper extremity. Because Dr. Gwyn opined claimant had no permanent functional impairment, he did not testify as to the amount of claimant's preexisting functional impairment. Dr. Fluter opined that all of the 13% permanent functional impairment he assigned was attributable to claimant's current injury.

Dr. Fluter was unaware that claimant was assigned a permanent functional impairment by Drs. Melhorn and Murati following claimant's surgeries in 2000. Dr. Fluter acknowledged claimant may have had a preexisting functional impairment, but did not testify as to the amount of the preexisting functional impairment. He attributed all of claimant's functional impairment to the carpal tunnel syndrome that developed after 2005.

Reducing claimant's award in the current claim, as suggested by respondent, would require a fact finder to guess the amount of claimant's preexisting impairment. Claimant's functional impairment after his 2000 injuries was never firmly established, as that claim was settled. Claimant's prior functional impairment for each upper extremity could be 7.05% as opined by Dr. Melhorn, 10% as opined by Dr. Murati, 8% as agreed upon by the parties or yet some other figure. Claimant testified that after his 2000 surgeries, his symptoms resolved. That testimony might also impact a physician's opinion as to the amount of claimant's preexisting functional impairment.

Robles requires respondent to establish the preexisting functional impairment by competent medical evidence. Respondent did not present sufficient medical evidence to establish the amount of claimant's preexisting functional impairment. In *Jacobs*, there was testimony by two physicians regarding the amount of claimant's preexisting impairment. Here, there was no testimony by Drs. Gwyn and Fluter as to the amount of claimant's

preexisting impairment. Therefore, the Board concludes respondent is not entitled to a reduction in claimant's award pursuant to K.S.A. 2009 Supp. 44-501(c).

The Board finds that claimant has a 10% permanent functional impairment for loss of use of the left forearm and a 10% permanent functional impairment for loss of use of the right forearm.

AWARD

WHEREFORE, the Board affirms the June 28, 2011, Award entered by ALJ Clark.

IT IS SO ORDERED.

Dated this ____ day of October, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

Dr. Gwyn, the treating physician, diagnosed claimant with recurrent carpal tunnel syndrome in both hands. He described the surgeries he performed as revisions of claimant's prior bilateral carpal tunnel release surgeries. The record establishes claimant's current bilateral carpal tunnel syndrome condition to be an aggravation of a preexisting condition as contemplated by K.S.A. 2009 Supp. 44-501(c). Therefore, claimant is only entitled to receive permanent partial disability compensation to the extent that the new injury caused increased disability. The record contains opinions from two physicians concerning the percentage of claimant's preexisting impairment. Following claimant's bilateral carpal tunnel syndrome surgeries in April 2000, Dr. Melhorn rated claimant's permanent impairment of function as 7.05% to each upper extremity. Dr. Murati rated each upper extremity at 10% permanent impairment of function. These impairment ratings were both described as being pursuant to the fourth edition of the AMA *Guides* and were both

described as permanent. Dr. Fluter seems to believe that claimant had no preexisting impairment because claimant reported doing well after his surgeries in 2000. If improvement post-surgery is a basis for finding no permanent impairment of function then this would support Dr. Gwyn's opinion that claimant has no functional impairment. Moreover, Dr. Fluter was unaware of Dr. Melhorn and Dr. Murati having rated claimant after those surgeries. Dr. Fluter's ratings were based on claimant's condition as of the date of his examination. Dr. Fluter did not exclude the possibility of preexisting impairment. He simply did not take into consideration the preexisting impairments and did not offer an opinion as to what percentages of impairment may have preexisted the new injuries. While I agree with the majority that claimant does have a current permanent impairment of 10% to each forearm, I disagree that respondent has failed to establish the amount of claimant's preexisting functional impairment by competent medical evidence. Claimant's preexisting impairment lies somewhere between 7.05% and 10% to each forearm. Claimant agreed to an 8% impairment in 2001. I would find claimant's preexisting impairment was 8% to each forearm. Pursuant to K.S.A. 2009 Supp. 44-501(c), the award should be reduced accordingly.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge